

In Re: Pork Antitrust
Litigation

St. Paul, Minnesota
February 25, 2021
9:01 a.m.

(MOTION HEARING VIA ZOOM)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

(Via Zoom)

THE COURT: This is the United States District Court for the District of Minnesota. I'm Magistrate Judge Hildy Bowbeer. We are gathered by Zoom this morning for a hearing in the matter of In Re: Pork Antitrust Litigation. This is Case Number 18-cv-1776. We're here on Docket Number 673, which is a motion by the direct purchaser plaintiffs to set aside fees from future direct action plaintiffs.

What I will do is what I have done before in terms of getting appearances, and that is essentially to call the roll. You've been through this drill before.

As always, we've got a court reporter on. She will be the only one responsible for making the official record of this hearing. I'm also making a recording through the Zoom platform, but no other recordings are permitted.

I've got one other person in the waiting room. Give that -- all right.

So let me start with appearances for the plaintiffs, starting with the direct purchaser plaintiffs. I'll call out the names of the people I'm expecting, and I'll just ask that you acknowledge your presence audibly. And if -- and then at the end of each group, as I always do,

1 I'll check to see if there's anybody on whose name I have
2 missed and who wants their appearance noted.

3 So starting with the direct purchaser plaintiffs,
4 Bobby Pouya?

5 MR. POUYA: Good morning, Your Honor.

6 THE COURT: Michael Pearson?

7 MR. PEARSON: Good morning, Your Honor.

8 THE COURT: Joseph Bruckner?

9 MR. BRUCKNER: Good morning, Your Honor.

10 THE COURT: And I understand, Mr. Bruckner, you'll
11 be the one speaking on behalf of plaintiffs today?

12 MR. BRUCKNER: That's right, Your Honor.

13 THE COURT: Brian Clark?

14 MR. CLARK: Good morning, Your Honor.

15 THE COURT: Arielle Wagner?

16 MS. WAGNER: Good morning, Your Honor.

17 THE COURT: Anybody else for the direct purchaser
18 plaintiffs whose name I have not called?

19 Moving on to the consumer indirect purchaser
20 plaintiffs, Shana Scarlett?

21 MS. SCARLETT: Good morning, Your Honor.

22 THE COURT: Hold on. I'm sorry. You'd think the
23 judge, above all people, would know to mute her cell phone
24 before the hearing.

25 Rio Pierce?

1 MR. PIERCE: Good morning, Your Honor.

2 THE COURT: Breanna Van Engelen? Is Ms. Van
3 Engelen on? All right. I'll come back to that later.

4 Daniel Hedlund?

5 MR. HEDLUND: Good morning, Judge. Gustafson
6 Gluek, I may be the only one from my firm. You can
7 obviously call others that are listed on there, but I'm not
8 sure --

9 THE COURT: All right. Michelle Looby, are you
10 on? All right. So at this point I don't have an appearance
11 by Ms. Van Engelen or Ms. Looby.

12 Anybody else whose name I have not called for the
13 consumer indirect purchaser plaintiffs?

14 Moving on to the commercial and institutional
15 indirect purchaser plaintiffs, Shawn Raiter? Okay. I'm not
16 getting an answer from Mr. Raiter.

17 Blaine Finley?

18 MR. FINLEY: Good morning, Your Honor.

19 THE COURT: David McMullan? Not hearing from
20 Mr. McMullan.

21 Katherine Barrett Riley?

22 All right. So far on behalf of the commercial and
23 institutional indirect purchaser plaintiffs, I've got only
24 Mr. Finley. Not to suggest that that's not plenty, but is
25 there anybody else whose appearance hasn't been noted on

1 behalf of that group of plaintiffs?

2 MR. FINLEY: I think that's going to be it for my
3 group today, Your Honor.

4 THE COURT: All right. Moving on, Commonwealth of
5 Puerto Rico, Matthew Weiler? Kyle Bates? I'm not hearing
6 anything from either Mr. Weiler or Mr. Bates. Is there
7 anybody on on behalf of the Commonwealth of Puerto Rico?

8 All right. Moving on to Winn-Dixie and Bi-Lo
9 Holdings, Patrick Ahern? And I'm not hearing from
10 Mr. Ahern. Is there anybody on for the Winn-Dixie
11 plaintiffs?

12 All right. Anybody representing any of the
13 plaintiffs whose name I haven't called?

14 Hearing nothing, moving on to defendants.
15 Defendant Smithfield Foods, John Cotter?

16 MR. COTTER: Good morning, Your Honor.

17 THE COURT: Brian Robison?

18 MR. ROBISON: Good morning, Your Honor.

19 THE COURT: Anyone else for Smithfield?

20 MR. COTTER: No, Your Honor.

21 THE COURT: Defendant Agri Stats, Tripp Monts?

22 MR. MONTS: Good morning, Your Honor.

23 THE COURT: Justin Bernick?

24 MR. BERNICK: Good morning, Your Honor.

25 THE COURT: Anyone else for Agri Stats?

1 JBS USA Food Company, Sami Rashid?

2 MR. RASHID: Good morning, Your Honor.

3 THE COURT: And, Mr. Rashid, I understand you will
4 be the one speaking on behalf of defendants; is that
5 correct?

6 MR. RASHID: I will not, Your Honor. Just so the
7 record is clear, JBS has reached a settlement with the
8 direct purchasers and decided to take no position on the
9 motion. But to the extent this issue plays out further in
10 the litigation, we would like to reserve the right to weigh
11 in on these types of issues in the future. So that's a
12 short way of saying I'm the last person to be arguing this
13 motion today.

14 THE COURT: All right. Moving on in terms of
15 representation for JBS, Don Heeman?

16 MR. HEEMAN: Good morning, Your Honor.

17 THE COURT: Good morning. Anybody else for JBS
18 USA?

19 Okay. Defendant Triumph Foods, Christopher Smith?

20 MR. SMITH: Good morning, Your Honor.

21 THE COURT: Anybody else for Triumph?

22 Defendant Seaboard Foods, LLC, Peter Schwingler?

23 MR. SCHWINGLER: Good morning, Your Honor.

24 THE COURT: Anybody else for Seaboard Foods?

25 MR. SCHWINGLER: Not for Seaboard, Your Honor, and

1 I will be arguing on behalf of the non-JBS defendants.

2 THE COURT: All right. Thank you, Mr. Schwingler.
3 Defendant Hormel Foods, Isaac Hall?

4 MR. HALL: I'm here, Your Honor. Good morning.

5 THE COURT: Good morning. And is anyone else
6 going to appear on behalf of Hormel?

7 MR. HALL: No.

8 THE COURT: And the Clemens Food Group and Clemens
9 Family Corporation, Mark Johnson?

10 MR. JOHNSON: On by phone, Your Honor.

11 THE COURT: And Christina Briesacher?

12 MR. BRIESACHER: Good morning, Your Honor.

13 THE COURT: And you know what, I go back and forth
14 about whether it ought to be Briesacher or Briesacher or
15 whether it's something else altogether. Would you please
16 tell me --

17 MR. BRIESACHER: You had it right. It's
18 Briesacher.

19 THE COURT: All right. Thank you.

20 Anyone else for the Clemens defendants?

21 Last call for anyone representing the defendants
22 who wants their appearance noted.

23 MS. RIDER ROHRBAUGH: Your Honor, did you go
24 through all the defendants, for Tyson?

25 THE COURT: You know what, I didn't. And for

1 whatever reason, it didn't show up on my cheat sheet and I
2 am sorry about that.

3 MS. RIDER ROHRBAUGH: No problem. This is Tiffany
4 Rider Rohrbaugh on behalf of Tyson defendants.

5 THE COURT: Thank you for speaking up,
6 Ms. Rohrbaugh.

7 And is there anyone else appearing on behalf of
8 the Tyson defendants?

9 MS. RIDER ROHRBAUGH: I don't believe so.

10 THE COURT: Am I missing anybody else, whether a
11 defendant -- oh, I have somebody else in the waiting room.
12 All right. I just admitted someone from the waiting room.
13 Can you please introduce yourself?

14 MR. AHERN: I believe this is me, Patrick Ahern,
15 for the Winn-Dixie plaintiffs. I apologize, Your Honor.

16 THE COURT: That's all right. Mr. Ahern, your
17 appearance is noted.

18 Anyone -- any counsel whose name I haven't called
19 and who wants their appearance noted?

20 All right. I think we've got the full list now.

21 So, as I indicated, this is Docket Number 673.
22 It's a motion by the direct purchaser plaintiffs. And,
23 Mr. Bruckner, it's your motion, so I'll give you the first
24 crack at the podium.

25 MR. BRUCKNER: Great. Thank you, Your Honor.

1 Your Honor, we're seeking an order that would have
2 the defendants set aside 10 percent of the monetary value of
3 any settlement or judgment obtained by any direct action
4 plaintiff who filed a lawsuit after the Court's October 20th
5 of 2020 order that upheld our complaint, the direct
6 purchaser plaintiffs' complaint, against defendants' motions
7 to dismiss.

8 And with the Court's indulgence and the court
9 reporter's indulgence, I probably will refer to the direct
10 purchaser plaintiffs as the DPPs and any direct action
11 plaintiffs as the DAPs. I try to avoid the acronyms, but
12 after a point, it becomes inevitable.

13 THE COURT: Understand.

14 MR. BRUCKNER: In any event, Your Honor, what
15 we're seeking, it would provide a fund for the DPPs, at a
16 later time and on a fully-developed -- or more
17 fully-developed record, to seek fair compensation for the
18 extensive work that we've done and the successes we've
19 achieved that are going to provide a common benefit to any
20 future DAPs and all direct purchasers of pork.

21 I'm happy to address the defendants' --
22 defendants' objections in a few moments, which I'll note all
23 of which other Courts have rejected, but I want to say at
24 the outset that the defendants don't have any standing.
25 They don't raise a single right of their own that's affected

1 by this motion.

2 Now, let me spend a minute just setting the
3 context for this motion. We've already expended significant
4 time and resources in this case, and we've significantly
5 advanced the case. We prepared a comprehensive and original
6 complaint. This is not a Government follow-on, and our
7 complaint includes an extensive factual investigation and
8 economic analyses. We had our complaint upheld by the
9 Court, and we largely defeated the defendants' motions to
10 dismiss.

11 We've accomplished significant discovery, and we
12 established a pretrial schedule. We've met and we've
13 conferred with the defendants on written discovery and
14 production of documents. We negotiated document custodians
15 and other sources of ESI. We negotiated an ESI protocol.
16 We've issued third-party subpoenas, and we've briefed
17 discovery disputes. And, notably, we've reached a
18 significant icebreaker settlement with one defendant for 24
19 and a half million dollars.

20 Now, we're going to continue -- we, being the
21 DPPs, are going to continue to lead the prosecution of this
22 case for all direct purchasers, all of whom at the moment
23 are members of the putative direct purchaser class. That's
24 going to include fact discovery, expert discovery and
25 analyses, dispositive motions, and trial.

1 Now, if our experience in similar cases is any
2 guide, the work that we've done and the achievements that
3 we've made are going to lead at least some direct action
4 plaintiffs to opt out of any certified direct purchaser
5 class, file their own complaints, and seek their own
6 recoveries. And if and when they do so, they're going to
7 benefit from the work we've put in and the successes that
8 we've achieved. Now, they're entitled to file their own
9 case, assuming they're fully informed, but they are not
10 entitled to take our hard work and our achievements for
11 their own benefit without fair compensation.

12 And as Judge Orrick noted in the *Lidoderm* case,
13 absent an order, like the one we seek, we won't know when or
14 if opt-outs settle and benefit from our work. So we think
15 it's not only fair that the direct action plaintiffs pay
16 fair compensation for the benefits they receive, it's also
17 fair to all of the direct purchasers who stay in the class
18 so that they're not bearing a disproportionate share of the
19 litigation costs in litigating this case -- in prosecuting
20 the case.

21 Now, I want to stress that the amount of fair
22 compensation, what exactly is fair, that question is not
23 before the Court today. We're simply asking the Court to
24 establish a set-aside so that, at an appropriate time on a
25 developed record, the truly affected parties, that is, the

1 DPPs, the DAPs, and the Court, not the defendants, can
2 determine what compensation is fair.

3 Now, I also want to stress there's no risk of
4 double recovery. All compensation for us as counsel for
5 DPPs and for the DPPs is going to be court reviewed and
6 court approved. The Court is going to review and approve
7 not only any fees we get based on our recovery for the
8 class, but the Court is also going to review and approve any
9 distributions from these set-aside funds.

10 Now, you have the authority -- the Court has the
11 authority --

12 THE COURT: On --

13 MR. BRUCKNER: I'm sorry. Yes, Your Honor.

14 THE COURT: On the issue of authority, I didn't
15 see addressed in either side's briefs a question that I
16 always have to consider, which is whether as a Magistrate
17 Judge I've got the authority or whether a question like this
18 has to go to the Article III Judge. And I was -- it looked
19 like almost it -- in almost every situation any set-aside
20 order has been issued by a District Judge, an Article III
21 Judge. I think there was one, maybe, that was cited by the
22 parties in which a Magistrate Judge had issued the order,
23 but without consideration of the issue of authority. And I
24 was curious about whether that was something that you could
25 comment on.

1 MR. BRUCKNER: Your Honor, I think you're correct.
2 I do not think we cited specifically that issue in our
3 brief; that is, can it be the Magistrate that enters that
4 order or is it the Article III Judge. And when we did file
5 this motion, the Court did suggest or request that we file
6 it with Your Honor and not with Judge Tunheim.

7 If you would like supplemental briefing on that
8 question, we'd be more than happy to provide it. It does --
9 we think, and as I'll argue in a moment, it falls within the
10 Court's inherent authority to manage and administer these
11 cases, and Your Honor has entered other similar orders.
12 We're not seeking any adjudication of a substantive right of
13 anyone, whether a future DAP or any party before the Court
14 now. All we're asking is for a procedural device, a
15 procedural set-aside.

16 So, anyway, with the Court's indulgence, we're
17 happy to provide supplemental briefing on that very point if
18 you like, but I believe it's within the Court's ministerial
19 and management authority to manage and direct these cases,
20 as Your Honor has done so far in setting schedules --

21 THE COURT: Yeah, just one other question on
22 the -- on the issue of authority, and that is to what
23 extent -- if I were to grant the motion, or Judge Tunheim,
24 for that matter, if direct actions are brought by plaintiffs
25 in other district courts, to what extent would any order

1 that we may enter here on a -- requiring a set-aside even
2 apply or have effect in those other actions, in those other
3 jurisdictions?

4 MR. BRUCKNER: Here's how I think that would play
5 out, Your Honor. Number one, if cases that are
6 substantially similar to these cases get filed in other
7 jurisdictions, I think the defendants would be at the front
8 of the line to seek to transfer them to this Court and to
9 have them consolidated with these cases. And you could
10 either do it under 28 U.S.C. 1404, the change of venue
11 statute, or you could initiate an MDL under Section 1407.

12 So I think all parties, given the significant
13 advances we've made in this case so far, would seek to bring
14 them here. And, as I say, I think the defendants would be
15 at the front of the line, because they'd rather be in fewer
16 courts than more courts.

17 In the unlikely event that some case did escape
18 this Court's jurisdiction, then I think the onus is on us,
19 the DPPs. This Court doesn't have the authority, I don't
20 think, to enter an order in some other court. In that
21 event, I think it would -- the burden would be on us, the
22 DPPs, to take Your Honor's order or Judge Tunheim's order,
23 as the case may be, and seek a sequestration order or a
24 similar order in that other court and -- if the facts
25 warranted it. And as I can get into in a moment, how much

1 compensation is fair and do the facts warrant it will, in
2 some degree, be a case-by-case determination. And the same
3 would be true for any case in this scenario that would not
4 end up before this Court.

5 As I say, I think that's an unlikely scenario, but
6 it's possible. But, again, the burden would be on us to try
7 to carry that out and try to execute it.

8 THE COURT: Okay. Go ahead.

9 MR. BRUCKNER: I think the -- one of the points I
10 was going to make is that there is no risk of double
11 recovery here because the Court is going to approve and
12 review all of the fees that we're going to obtain, whether
13 it's from a class recovery or whether it's from the
14 set-aside orders.

15 One question the Court might have is, you know,
16 why should I decide this now, there aren't any DAPs in front
17 of me. I think the response to that is because we've
18 already significantly advanced this case, and we've achieved
19 significant and certain and concrete benefits for any future
20 DAPs. Again, we're not asking the Court to adjudicate any
21 substantive rights of any parties that are not presently
22 before the Court. We're simply asking that the funds be set
23 aside so that they are available when a determination is
24 made on a fully-developed record. If it's not established
25 now, we do run the risk that future DAPs, without us even

1 knowing, will settle a claim based partly or entirely on the
2 work that we did.

3 There was one DAP case, Cheney Brothers, that was
4 on file when we filed this motion. They dismissed it
5 shortly after we filed this motion. I don't know why they
6 dismissed it, and I'm not suggesting or intimating anything,
7 and I'm not going to speculate on why they dismissed it. I
8 simply don't know, and we simply don't know. But it
9 illustrates the problem that we face in the absence of an
10 order like this.

11 One aspect of this is who's the best party to hold
12 the funds. We propose that the defendants do it, but that's
13 not the only way that it can be done. In *Baycol*, Judge
14 Davis appointed an escrow agent himself and the Court held
15 the funds. In the *Guidant Defibrillators* case, Judge Frank
16 had plaintiffs' counsel establish the escrow account to hold
17 the funds. And in *Lidoderm*, Judge Orrick, in the Northern
18 District of California, had the defendants establish the
19 accounts and hold the funds.

20 What's important is that it be in an insured
21 escrow account, but which party holds it, among the various
22 possibilities, I don't think is particularly dispositive one
23 way or the other. We propose that the defendants do it
24 because that seems as simple as anything, but not
25 dispositive.

1 THE COURT: You know, I think what I'd like you to
2 turn to at this point is the argument the defendants have
3 made that the case is not significantly advanced, at least
4 not in the way and to the inflection points that have
5 characterized the cases in which set-asides have been
6 created. So could you address that?

7 MR. BRUCKNER: Sure. Happy to, Your Honor.

8 Well, they point to the *Generic Drugs* case and say
9 that significantly advanced means having a class certified.
10 Well, we disagree that this case is not significantly
11 advanced. And if you think about it, the fact that a class
12 is certified doesn't provide a rationale for not
13 establishing a set-aside now.

14 Frankly, we think that's just an arbitrary
15 line-drawing exercise. And, again, without any standing,
16 the defendants are saying, Draw the line somewhere else,
17 draw it farther down the road, draw it when a class is
18 certified. But, again, if you think about it, what's magic
19 about that particular marker? You could say that you can
20 draw the line when a complaint is filed. In this case,
21 arguably, I think you could. It's an original complaint
22 that represents a significant amount of time, investment,
23 investigation, and analysis. That's not what we're
24 proposing here.

25 But you can also -- we can draw the line at the

1 point at which the DPPs defeated the motions to dismiss.

2 That's the point at which the District Court, after no small
3 amount of motion practice and argument and briefing and
4 rebriefing, decided that the plaintiffs' complaint has
5 enough heft to allow discovery to go forward. That's a
6 clear and concrete and tangible benefit to any DAP that
7 files a case subsequent to that point.

8 You could argue that the line ought to be drawn
9 when -- not my dog, Your Honor.

10 THE COURT: If anybody has a dog in the
11 background, make sure you're muted, please.

12 MR. BRUCKNER: You could say that the line ought
13 to be drawn at the point that the DPPs achieve a significant
14 settlement, as we've done here. In this case, it
15 coincidentally happens to be about the same time that Judge
16 Tunheim upheld our complaints against the motions to
17 dismiss. But that too is a point at which at least one
18 defendant decided that the case was significant enough that
19 it wanted to resolve it by agreement, and it paid a
20 significant amount to do so.

21 So that's -- I think significantly advanced, I
22 think we certainly argue and submit that we have
23 significantly advanced the case. I think there is nothing
24 magic about whether a class is certified or not, if you
25 think about the rationale of what's the point, or what is it

1 that drives the need for a set-aside motion like this.

2 There is nothing magic or particularly pertinent about
3 having a class certified if you think about it in terms of
4 what benefit is provided to the -- to the DAPs that follow
5 on after our cases.

6 THE COURT: Can you point me to examples of cases
7 in which the case has reached the inflection points that you
8 are describing in this one in which a Court has agreed that
9 a set-aside would be appropriate? I mean, I've got to
10 believe that in -- that motions to dismiss, and, indeed,
11 hard-fought motions to dismiss, are regularly filed and the
12 case wouldn't be going forward at all if they hadn't been
13 successfully defeated, but that seems like it would turn
14 into the exception that swallows the rule if that's all
15 that's required to justify a set-aside. So can you point me
16 to some cases in which you had reached -- in those cases,
17 they had reached the point that you are describing this case
18 has reached and the Court has said, Yes, this is
19 significantly advanced, the set-aside is appropriate here?

20 MR. BRUCKNER: Your Honor, not beyond the cases
21 that we've cited in our brief, except I would note that we
22 do have a class preliminarily certified as part of the JBS
23 settlement, and I have not seen a case where a Court said,
24 No, no, it must be a litigated certified class before you
25 can consider something like a -- this sort of set-aside that

1 we're proposing here.

2 Again, I think if you look at -- oh, I would say
3 that -- I would have to check this to be sure, Your Honor,
4 but I believe that in the *Baycol* and *Guidant Defibrillator*
5 cases that are here in this court, I believe those motions
6 were -- or those funds were set as part of early
7 organizational orders in the case, but, again, I would have
8 to double-check the dockets in those cases to make sure that
9 that's correct.

10 THE COURT: All right. Go ahead.

11 MR. BRUCKNER: If I could, I want to address a
12 couple of the other points that the defendants raise, and
13 that is they speculate whether maybe the DAPs' cases really
14 are going to be so materially different that compensation
15 might never be warranted, they suggest.

16 But, again, putting aside the fact that they have
17 no standing, let's look at the particulars of that. Are the
18 DAPs going to develop their own theories of the case
19 materially different than ours? I guess it's possible. But
20 if they truly do allege a new theory of recovery and uncover
21 brand-new facts, that can be considered at the time that
22 fair compensation is determined on a developed record. If I
23 were such a DAP counsel with such a new theory, that is
24 certainly what I would argue, is that my case is as original
25 as anyone else's and, therefore, I don't owe anything to

1 anyone else. But that determination can be made once that
2 record is developed.

3 Are the DAPs going to pursue their own discovery,
4 as the defendants say? I think that's highly unlikely, and
5 it will only be to a limited extent, if at all. As the
6 Court has directed the parties, discovery is to be
7 coordinated as much as possible to make it as efficient as
8 possible, and I am sure that the defendants support that
9 goal as much as anyone.

10 Are the DAPs going to hire their own experts? I
11 presume they will. But, again, since DPPs have gone first
12 and likely will continue to go first and will continue to
13 make material and substantial progress in our cases, those
14 DAPs necessarily are going to benefit from the work of our
15 experts and our other work. But, again, that's a
16 determination that can be made at the time that a record is
17 developed.

18 I think my final point that I'd like to address
19 that the defendants make is that they suggest that the
20 antitrust cases don't have the same management problems that
21 a mass tort case has and, therefore, set-asides aren't
22 really necessary in a case like this. Well, A, I think
23 that's simply not true. They do present management issues.
24 Judge Orrick in *Lidoderm* specifically rejected that
25 argument. And in the similar *Broiler Chicken Antitrust* case

1 that's pending in the Northern District of Illinois, I think
2 Judge Durkin and Magistrate Judge Gilbert would strongly
3 disagree with the suggestion that the antitrust cases,
4 there's no management issues. There's a significant number
5 of DAPs in that case, and the management issues are
6 considerable.

7 So, with that, Your Honor, unless the Court has
8 any questions, I'll stand down.

9 THE COURT: I don't think at this point. I may
10 very well have some additional follow-up questions for you
11 after I hear from Mr. Schwingler, but let me give him a
12 chance at the podium first. And -- although,
13 Mr. Schwingler, hang on just one second. I want to look at
14 one thing before you start, so give me just a moment.

15 Yeah. Actually, I did have one more question for
16 you, Mr. Bruckner, and that is has this issue been addressed
17 yet in the *Broiler Chicken* litigation? Has a request for a
18 set-aside been made; and, if so, what did the Court do with
19 it?

20 MR. BRUCKNER: No, Your Honor, it has not yet been
21 addressed.

22 THE COURT: All right. Thank you. It's one of
23 the rare times that somebody is not pointing me to something
24 that the Judge did in *Broiler Chicken* and say, Here, do it
25 this way. So all right. Thank you.

1 Now, Mr. Schwinger, you're on.

2 MR. SCHWINGER: Good morning, Your Honor.

3 I will -- I'd like to start by addressing the
4 question of my client's standing and those of the other
5 defendants I'm speaking on behalf of this morning. If the
6 DPPs are correct, then there is nobody that has standing to
7 oppose this motion, because there are no DAPs that would
8 be -- that exist that are subject to the motion, and
9 apparently the defendants have no rights at stake here
10 either. We don't agree with that. The order would require
11 us to set aside funds, so it's directed at us, and so of
12 course we have standing. But that argument underscores the
13 very problem with the motion, which is that it's premature
14 on every possible level.

15 Because Cheney Brothers has dismissed its case,
16 there are no pending DAP actions that are subject to the
17 motion, so it's moot as to Cheney Brothers, but it's unripe
18 as to everybody else.

19 But, more importantly, the motion is unripe and
20 premature under the DPPs' own authorities. They cite three
21 class actions, I believe, in their brief. Two are antitrust
22 cases, and one involved Hurricane Katrina. In all three,
23 the Court granted some form of compensation, not necessarily
24 a set-aside, to class counsel after certifying a class.

25 We focused on the two antitrust cases in our

1 brief, *Lidoderm* and *Linerboard*. I won't repeat what we said
2 chapter and verse, but I'd like to emphasize a few points.
3 Those cases had a few things in common. The orders came
4 years into the cases after substantial document production,
5 millions of pages of documents I think the record showed in
6 *Lidoderm*, it was probably even more in *Linerboard*, dozens of
7 depositions had been taken by class counsel, motion
8 practice, expert discovery, expert reports, and the class
9 counsel there had successfully prevailed on class
10 certification, and then *Linerboard* successfully defended a
11 23(f) appeal.

12 After the classes were certified and then counsel
13 was actually representing these entities, then you had a
14 wave of opt-outs by large class members who filed tagalong
15 complaints and wanted access to the discovery record that
16 was, at that point in time, massive.

17 And so on that posture is when the Courts granted
18 the type of relief -- or at least in *Lidoderm* the type of
19 relief that the DPPs seek here. I believe *Linerboard*
20 involved a more generic order.

21 So none of those facts are present here. And
22 we're certainly not trying to trivialize what class counsel
23 or putative class counsel have done so far in filing a
24 complaint and opposing a motion to dismiss and negotiating
25 discovery, but it's not what happened in the two prior cases

1 they rely on so heavily.

2 The motion is also premature on a practical level.
3 There is no real-world need for this relief now. You know,
4 they talked about three sort of practical concerns in their
5 brief. Just to hit them briefly, it's pure speculation to
6 say that someone will bring a case, free ride on class
7 counsel's actions, settle, and then disappear. We --
8 it's -- they point to no examples of that ever happening in
9 the past. But to suggest that it might happen in this case
10 just shows how premature the motion is.

11 The order will not promote judicial economy, which
12 they argued in the brief, I'm not sure if Mr. Bruckner
13 mentioned that in his remarks this morning, but it would
14 have the opposite effect. It would encourage DAPs to file
15 in other jurisdictions and deprive everybody on the Zoom
16 this morning of the benefits of coordinated proceedings.
17 And so you have the forum shopping issue, which is just
18 another way in which this order would impact defendants, but
19 it would impact everybody.

20 And then, of course, as Mr. Bruckner mentioned
21 several times, the ultimate entitlement to any money will
22 have to be addressed in future motions at a later time on a
23 fully-developed record, which were Mr. Bruckner's exact
24 words. Of course that's correct. And that's why we
25 shouldn't be addressing these issues now, when there's

1 nobody that's even opted out yet.

2 And then, lastly, I won't dwell on the notice
3 rationale, but of course if notice was the plaintiffs'
4 concern, there's other ways to give notice than to order a
5 set-aside.

6 I don't want to dwell on whether this kind of
7 relief can ever be appropriate in an antitrust case, but
8 what is important is that the Court need not wade into that
9 issue now in a vacuum. It makes more sense to evaluate
10 whether this concept even fits the case on a more developed
11 record with an actual DAP in the room to defend its
12 interests. But if the Court is inclined to address that
13 issue, we do not believe that this type of relief is
14 appropriate in an antitrust case with a fee-shifting statute
15 and all the other mechanisms that can ensure that
16 Mr. Bruckner and his colleagues, if successful, are paid for
17 their work.

18 The -- I'm just checking to see if there's
19 anything else I need to address from Mr. Bruckner's comments
20 before I wrap.

21 Mr. Bruckner noted that every Court has rejected
22 the defendants' objections, and I -- it is possible that
23 *Lidoderm* and *Linerboard* rejected similar objections that
24 were made years later at a totally different time, but I
25 don't believe any Court has rejected our objections on this

1 record. And I think that has to be the case because
2 plaintiffs cite no authorities entering any such order. So
3 as far as I know, *Generic Drugs* is the one case that took
4 this on before class cert, and the Court there agreed with
5 us.

6 THE COURT: What about Mr. Bruckner's argument
7 that class certification is kind of at an arbitrary place to
8 draw the line, that important and valuable work gets done
9 all the way up through and -- but before that and that,
10 therefore, counsel's interest in assuring that there are not
11 free riders on their work is already -- is already in play?
12 How would you address that sort of the arbitrary line in the
13 sand argument?

14 MR. SCHWINGLER: I have a couple reactions to
15 that, Your Honor. The first is it's the least arbitrary
16 possible line, because it's a major point in the case where
17 counsel, who then would later seek compensation from others,
18 has had to test -- put its case to the test in front of the
19 Judge with evidence and present the developed record and the
20 legal theories that fit that record and get the Judge's
21 blessing at least as to class certification. The order then
22 certifying the class makes those lawyers the lawyers of the
23 absent class members until they opt out.

24 As of right now, apart from whatever significance
25 the JBS settlement may have, which I think is none for

1 purposes of this motion, Mr. Bruckner and his colleagues
2 don't represent anybody other than the class -- the named
3 plaintiffs in the complaints.

4 But it's not arbitrary. There's a reason why
5 Courts don't grant this relief before class cert. It has to
6 do with the fact that the record isn't developed at that
7 point. There's no record of free riding here, right? There
8 is -- there was in *Linerboard*, and that's the big
9 difference.

10 But the question and, you know, the suggestion
11 that class cert is arbitrary underscores if not at class
12 cert, then when. And doing it now is just as arbitrary, if
13 not more.

14 I heard Mr. Bruckner say you could make an
15 argument that once we filed our complaint, that's when a
16 set-aside order should come in. And my reaction to that is
17 I think the question Your Honor had, if this is really
18 feasible, if this is an appropriate time to enter this
19 relief, why don't you see this in every antitrust class
20 action. Because there are many that get past Rule 12 and
21 none that have entered a set-aside order at that stage in
22 the case. And the reason is simply Courts require a much
23 more developed record and much stronger showing of free
24 riding, and that has occurred in every instance after class
25 certification.

1 THE COURT: Thank you, Mr. Schwingler.

2 Mr. Bruckner, I'm going to give you a chance to
3 reply.

4 MR. BRUCKNER: Thank you, Your Honor. I thought
5 Mr. Schwingler asked a really good question toward the end,
6 and that is if not at class certification, then when. And I
7 think that's a very important question. And I think if you
8 think about it for a moment, you end up at, well, what's the
9 rationale. And I submit the rationale for all of these
10 Courts who have entered these orders is what's the point at
11 which the DPPs' work has provided a real and material
12 tangible benefit to direct action plaintiffs.

13 Class cert -- in the vast majority of cases, the
14 plaintiff class certification is not when direct action
15 plaintiffs start appearing and start filing cases. That
16 almost always is shortly after motions to dismiss are filed
17 and shortly after settlements start to occur. They do not
18 wait until classes are certified. But, again, if you think
19 about the rationale of what is the point at which the DPPs'
20 work has provided some benefit for direct action plaintiffs.

21 Let me make a couple of comments on
22 Mr. Schwingler's point about judicial economy. Number one,
23 I have never seen a class -- I'm sorry -- a set-aside order
24 encourage forum shopping. But, again, I mean -- and the
25 risk of forum shopping is present in any case, set-aside

1 order or not. But, as I said, I think the parties would be
2 unified -- the parties in this case would be unified in
3 seeking to have any such cases transferred to this Court
4 just for matters of judicial efficiency. So I do not see it
5 as being less economical from a judicial standpoint.

6 And, in fact, the alternative that the defendants
7 are suggesting, that we wait until a DAP shows up, we wait
8 until a DAP has their recovery -- and assuming that we even
9 know about it, we, the direct purchasers, because there's no
10 requirement for Court approval or anything like that -- then
11 let's address the matter then. To address it and litigate
12 it piecemeal and on a case-by-case basis, that seems to be
13 the least efficient of all the alternatives here.

14 And, similarly, when he says, You know, let's
15 address it when there's a determination to be made, was
16 Mr. Schwingler's suggestion, again, by that point, from our
17 standpoint, the horse is already out of the barn. The case
18 is settled. The DAP case is settled. The case is resolved.
19 At that point -- and there are no funds to be set aside --
20 we can try and we can do our best, but it is much more
21 fraught with uncertainty than the simple requirement now
22 that the funds be set aside.

23 Mr. Schwingler noted that there's no real-world
24 relief or no action required now. If you think about the
25 mechanism of how this is going to work, if the Court enters

1 a set-aside order, Mr. Schwingler is correct that there will
2 not be any action required by any party until a DAP files
3 and then achieves a recovery. At that point, the escrow
4 account can be opened and the set-aside can be deposited in
5 the -- in the escrow account. Up until that time, he's
6 correct, there is no action to be required, but the
7 procedure will be in place. And it is a not dissimilar
8 procedure from many other aspects of court organizational
9 orders and court ministerial orders that provide that future
10 parties who file cases who end up consolidated before the
11 Court must follow the following strictures and the following
12 guidelines, and it's no different than that.

13 Mr. Schwingler referred to fee-shifting statutes
14 and other ways to make sure that DPPs are adequately
15 compensated. That misses the point. I don't see how a
16 fee-shifting statute, which, by the way, typically only
17 comes into play when and if we take a defendant to trial and
18 we win a verdict and we win a judgment, that's when
19 fee-shifting statutes come into play, how that addresses
20 whether a DAP was able to benefit from our work without fair
21 compensation, I just don't see the connection. I just don't
22 get how that argument applies in the least.

23 Finally, to harken back to the *Broiler* point, I
24 know Your Honor was thrilled that, you know, we weren't
25 bringing *Broiler* back into this, but I'm only going to do it

1 a little bit at the end. I will note there are a
2 significant number of opt-outs in the *Broiler* case. And
3 those companies that buy chicken, they also buy pork, so I
4 think it's a pretty good harbinger of what we are going to
5 see in this case.

6 And, again, we think the time is opportune now to
7 set up this procedure, to enter this order. All parties
8 will know it coming in. All parties will know it when they
9 consider whether they want to opt out or not. Again, once a
10 DAP files and once a DAP paddles its own canoe, you know,
11 pursues its own case, all of those considerations will be
12 relevant and will be ripe at the time a determination is
13 made of what's fair compensation. All this is is a
14 procedural device to make sure that funds are available to
15 address that compensation or to provide for that
16 compensation.

17 Unless the Court has anything else, I think that's
18 all I have.

19 THE COURT: All right. I don't think so,
20 Mr. Bruckner.

21 Mr. Schwinger, anything you haven't already said
22 in response to the points that Mr. Bruckner made?

23 MR. SCHWINGLER: No. Just the only point I'd like
24 to close on is just to come back to the fundamental issue,
25 which is no Court has ever granted this relief at this time

1 and for many good reasons, so I won't repeat any of those
2 reasons, but that's the bottom line.

3 THE COURT: All right. All right. Well, I'm
4 going to take a few minutes. I want to look at a couple of
5 things and think about how I want to proceed from here. So
6 I'm going to go off camera. You're welcome to go off
7 camera. I'll suspend the recording for a moment. I think
8 I'll only need about five minutes or so, and then we'll
9 figure out where we go from here.

10 (Recess taken at 9:50 a.m.)

11 * * * * *

12 (10:03 a.m.)

13 **IN OPEN COURT**

14
15 THE COURT: We're back on the record in the matter
16 of In Re: Pork Antitrust Litigation, 18-cv-1776, and
17 specifically on the direct purchaser plaintiffs' motion for
18 entry of a set-aside order.

19 I am going to deny the motion, but I'll give you a
20 fairly detailed explanation of why so that if the DPPs
21 believe that it's something that they'd like to raise with
22 Judge Tunheim on appeal, this record should give you an
23 adequate explanation, an adequate record on which to do
24 that.

25 Let me note at the outset that I do have some

1 questions still about the authority of a Magistrate Judge
2 versus an Article III Judge to order a set-aside of this
3 type. Since I'm denying the motion and specifically denying
4 the motion as premature, I think that probably makes that a
5 moot point, but down the line if a -- if the motion is
6 renewed, it would probably be helpful if, plaintiffs, you
7 would specifically address that in the motion so that we can
8 be confident that it's coming to the right person.

9 As for the standing issue, I think the defendants
10 do have standing to object to this. But even if they
11 didn't, as the plaintiffs have noted, this is an issue that
12 goes to the Court's inherent ability to manage its own
13 cases, its own docket, and it also implicates the rights of
14 people and entities who are not, at this point, before the
15 Court, and therefore I consider it not only my option, but
16 my responsibility to consider any arguments that ought to
17 and do inform the decision to be made.

18 To be clear, I'm denying the DPPs' motion without
19 prejudice. That's probably clear from the fact that I'm
20 denying it on the ground that it's premature.

21 I don't disagree that counsel for the DPPs has
22 done important work, has done valuable work thus far in the
23 case; but, as I noted in some of the questions I asked
24 during the argument, I think if that was sufficient to
25 trigger the appropriateness of the set-aside, these kinds of

1 orders would be routinely granted, and they're not.

2 The Courts have routinely talked about the case
3 being significantly advanced and not simply a question of is
4 there a point at which you could assign real and tangible
5 value to the work done by plaintiffs' counsel. And I'm not
6 persuaded that this case is yet significantly advanced in
7 the sense that's been described by the Courts when they have
8 granted or denied orders of this kind.

9 First, it is significant to me that -- and has
10 been significant in those other matters that class
11 certification hasn't been granted in this case. And I agree
12 with the point defendants made that I don't think that's an
13 arbitrary line to draw. I never say never. I'm not saying
14 that I couldn't imagine a situation or there could never be
15 a situation in which a set-aside could be granted before
16 class cert, but the case law cited to me doesn't -- doesn't
17 cite such a case yet or even a Court saying -- you know,
18 describing what it might look like if it happened, and I
19 certainly haven't seen anything to tell me that in this case
20 at this point that that line isn't an important one.

21 There are other distinguishers here. At this
22 point, there's been no steering committee appointed.
23 Asterisk, more on that in a moment. And although, as I
24 said, I know, I agree that important work has been done on
25 preparation for discovery and some discovery, but discovery

1 in many ways is still just getting started.

2 And, finally, it is also significant to me that at
3 this point there aren't any direct action plaintiffs, and so
4 right now I think this motion is still more a solution in
5 search of a problem, and we don't have -- we don't have a
6 problem and -- or concrete reason to expect and predict that
7 there will be one.

8 So I think the authority that the direct purchaser
9 plaintiffs has relied on is distinguishable. *Modified Rice*,
10 that was an MDL, which this is not, but the Court in that
11 case created the common benefit fund after the special
12 master noted that the plaintiffs' leadership group had
13 invested 100,000 hours and had taken more than 100
14 depositions, conducted bellwether trials, and prevailed on
15 several motions for summary judgment.

16 I did, by the way, during the break confirm that
17 there was an early set-aside order in *Baycol* and *Guidant*.
18 Again, those were MDLs, and I think there is some
19 distinction there, but I also noted that it doesn't appear
20 that there was any opposition to that in those cases, so the
21 Judge in each of those cases was not called on to actually
22 consider the question of prematurity. It wasn't raised. It
23 was -- the set-aside order was apparently in there by
24 agreement, or at least that's -- you know, my quick read of
25 the record suggested that that was the case.

1 *In Re Linerboard* can also be distinguished. In
2 that case, discovery essentially had been concluded. And
3 the tagalong plaintiffs, the free rider plaintiffs, many of
4 them were former class members who had opted out and then
5 filed separate suits as discovery was concluding. And the
6 Court noted that it was the rare antitrust case in which
7 major entities and their counsel awaited the development of
8 the case by designated counsel and only filed suit on the
9 eve of the conclusion of discovery. We're not there yet,
10 and it's not clear that -- that that will happen here.

11 *Lidoderm*, an antitrust case, the Court ordered a
12 set-aside. But, again, there the class had been certified
13 and the Court found the litigation was significantly and
14 sufficiently advanced. *Turner* can also be distinguished in
15 terms of how far along that case was compared to this one.

16 So I do find the authority cited by the defendants
17 to be more apropos to this case and to distinguishing the
18 status of this case, and *Generic Drugs* being kind of the
19 primary key there where the Court denied the motion for a
20 set-aside fund without prejudice, noting that no class had
21 been certified and that the scope of affected parties had
22 not yet been established, and essentially found that the
23 record simply wasn't well enough developed and the case not
24 sufficiently advanced to warrant the entry of an order of
25 this kind.

1 As I've indicated, if and when, and I'm assuming
2 very likely, a new motion is brought, I do want you to take
3 a look at the question of whether this ought to go to Judge
4 Tunheim. But, as I say, given the basis on which I'm
5 denying the motion at this point, I think that's a question
6 for another day.

7 So I'm denying the motion without prejudice, and I
8 won't be issuing a written order. I'll do minutes that
9 simply capture the bottom line here, but this should give
10 you enough of a record if you want to take it further at
11 this point.

12 I mentioned an asterisk. There is one other
13 matter I wanted to address while I've got you here. And to
14 be clear, on this next matter, I will also be doing a text
15 only order because I don't think I've got everybody here
16 who's interested in the question, but I do want to get it on
17 your radar. The commercial and institutional plaintiffs had
18 filed a motion to appoint a steering committee -- I'm
19 sorry -- commercial and institutional indirect purchaser
20 plaintiffs had filed a motion to appoint a steering
21 committee. It looks like the motion was opposed.

22 But there was a very important issue that wasn't
23 addressed in any of the filings and without which I'm not
24 willing, and Judge Tunheim would not want me, to take the
25 motion up, and that is there was no mention, as far as I

1 could tell in any of the memoranda or in any of the
2 declarations, of diversity in the proposed steering
3 committee. There may very well be diversity there, but it
4 wasn't mentioned. It wasn't called out either in the
5 memorandum or in any of the declarations.

6 And I think I noted in one of our early
7 conferences, maybe our very first conference, that it's
8 important both to me and, more importantly, to Chief Judge
9 Tunheim that diversity be reflected in the leadership roles
10 in litigation of this kind. And, in fact, it was something
11 that was specifically addressed in the submissions when you
12 asked to have interim lead counsel appointed. So its
13 absence concerned me in the more recent filings.

14 So, as I say, I'll do a -- I'll do a text-only
15 entry as well so that all counsel who are getting CM/ECF
16 notices on this case and, in particular, the counsel who
17 were involved in the filing of that motion will know this is
18 on my mind, but just wanted to get it on your radar.

19 But I am not going to enter an order on that
20 motion until it is supplemented with some specific
21 information about the diversity in the leadership of the
22 proposed steering committee.

23 So I think that covers what I wanted to cover this
24 morning. Is there anything else that we should address
25 before I adjourn the hearing?

1 Mr. Bruckner, on behalf of any of the plaintiffs?

2 MR. BRUCKNER: No, Your Honor, nothing on our
3 agenda.

4 THE COURT: All right. And, Mr. Schwinger, or
5 any of the other defense counsel who are here, anything
6 further?

7 MR. SCHWINGLER: Nothing from me, Your Honor.

8 THE COURT: Okay. Last call?

9 All right. Thank you very much. We are
10 adjourned.

11 (Court adjourned at 10:16 a.m.)

12 * * *

13

14

15 I, Erin D. Drost, certify that the foregoing is a
16 correct transcript from the record of proceedings in the
17 above-entitled matter to the best of my ability.

18

19 Certified by: s/ Erin D. Drost

20 Erin D. Drost, RMR-CRR

21

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23

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25